

## Saint Louis University Law Journal

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Volume 52

Number 4 *Cooper v. Aaron: Little Rock and the Legacy of Brown (Summer 2008)*

Article 14

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2008

### **Alienating the Unalienable: Equal Protection and Valley Park, Missouri's Illegal Immigration Ordinance**

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#### **Recommended Citation**

Sarah E. Mullen-Dominguez, *Alienating the Unalienable: Equal Protection and Valley Park, Missouri's Illegal Immigration Ordinance*, 52 St. Louis U. L.J. (2008).

Available at: <https://scholarship.law.slu.edu/lj/vol52/iss4/14>

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## ALIENATING THE UNALIENABLE: EQUAL PROTECTION AND VALLEY PARK, MISSOURI'S ILLEGAL IMMIGRATION ORDINANCE

### INTRODUCTION

Mayor Jeffrey Whitteaker turned up his radio as he cruised down Highway 30 in his American-made pick-up. A radio report caught his ear. It described a rousing controversy over a municipal ordinance recently passed in the small town of Hazelton, Pennsylvania.<sup>1</sup> Hazelton's City Council had enacted an ordinance that cracked down on the "illegal immigrant" residents. Whitteaker, impressed by the concept, proposed such an ordinance to his city's attorney at the next Board of Alderman meeting.

On July 17, 2006, Valley Park, Missouri, a small, sleepy, predominantly White suburban community which had not experienced an influx of illegal immigration within its city limits, adopted Ordinance No. 1708, "An Ordinance Relating to Illegal Immigration Within the City of Valley Park, Mo," without a dissenting vote.<sup>2</sup> As Whitteaker had envisioned, the ordinance was a copycat piece of legislation which employed the same language as the Hazelton ordinance.<sup>3</sup> When ABC News asked why his city would enact such legislation, Whitteaker replied, "[y]ou wouldn't change your motor oil after your engine blew up," and described the ordinance as "preventative maintenance," a means of "protecting [his] community from the social ills of illegal immigration."<sup>4</sup> Despite Valley Park officials' express sentiments that the "illegal aliens" could soon "overrun" their community, U.S. Census statistics do not indicate that Valley Park is a community in which a White

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1. Stephen Deere, *Law puts Valley Park Landlords in a bind*, ST. LOUIS POST-DISPATCH, Aug. 13, 2006, at A1.

2. VALLEY PARK, MO., Ordinance No. 1708, An Ordinance Relating to Illegal Immigration Within the City of Valley Park, Missouri, (July 17, 2006), *available at* <http://www.valleyparkmo.org/docs/Ordinance%201708.pdf>.

3. HAZELTON, PA., Illegal Immigration Relief Act (July 16, 2006), *available at* [http://www.hazletoncity.org/2006\\_16\\_Illegal\\_Alien\\_Immigration\\_Relief\\_Act\\_Ordinance\\_Amended.pdf](http://www.hazletoncity.org/2006_16_Illegal_Alien_Immigration_Relief_Act_Ordinance_Amended.pdf).

4. *ABC Nightly News* (ABC television broadcast Sept. 25, 2006); *see also* Stephen Deere, *Valley Park Follows Lead on Illegal Alien Law*, ST. LOUIS POST-DISPATCH, Aug. 19, 2006, at B1.

majority is scrambling to conserve its resources against a rapidly growing minority or immigrant, undocumented or documented, population.<sup>5</sup>

In haste or perhaps out of spite, the Valley Park Board of Alderman failed to allow for a buffer period before enforcement of the ordinance began. Local police began knocking on apartment doors immediately.<sup>6</sup> According to Hector Molina of the Archdiocese of St. Louis, twenty Valley Park families packed up their belongings and fled their Valley Park residences in the middle of the night. The families pulled their children from Valley Park schools and struggled for weeks to keep a roof over their head; Molina reports that they remain dependant on the charity of others in the St. Louis community.<sup>7</sup>

Beginning in Summer 2006 and continuing through Winter 2007, fifty-seven municipalities in seventeen states have considered or are considering municipal ordinances similar to that of Valley Park.<sup>8</sup> Ten municipalities have adopted “anti-illegal immigrant” ordinances.<sup>9</sup> And, although some of the ordinances call for a variety of measures, some more aggressive than others, all of the ordinances include these basic provisions: (1) prohibiting illegal aliens from renting in their jurisdictions, (2) imposing civil and monetary penalties on landlords who rent to “illegal immigrants,” (3) fining, and denying business permits, city contracts or grants to, employers who hire “illegal immigrants” and to any person or entity who has “aided or abetted” an “illegal immigrant” within the United States, and (4) defining English as the official local language.<sup>10</sup> More alarmingly, in late January 2007, the Missouri State Senate debated Senate Bill 348 which proposes state legislation that would include

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5. Hector Molina, Hispanic Outreach Director, St. Louis Archdiocese, Address at the Hispanic Leaders Group of Greater St. Louis (Oct. 11, 2006); see Missouri Census Data Center, available at <http://mcdc2.missouri.edu/trends/estimates.shtml>; U.S. CENSUS BUREAU, VALLEY PARK, MISSOURI PROFILE OF SELECTED SOCIAL STATISTICS, [http://factfinder.census.gov/servlet/QTable?\\_bm=y&-geo\\_id=16000US2975472&-qr\\_name=DEC\\_2000\\_SF3\\_U\\_DP2&-ds\\_name=DEC\\_2000\\_SF3\\_U&-\\_lang=en&-\\_sse=on](http://factfinder.census.gov/servlet/QTable?_bm=y&-geo_id=16000US2975472&-qr_name=DEC_2000_SF3_U_DP2&-ds_name=DEC_2000_SF3_U&-_lang=en&-_sse=on). Valley Park has 6,518 residents, ninety percent of whom are white. Valley Park has only 148 Hispanic residents (2.3% percent) and, as estimated, less than 1 percent of the Hispanic residents are undocumented, in other words about two residents are illegally present in the United States, as defined by federal law. Valley Park has 407 (6.2%) foreign born residents, 64 were born in Latin America, 254 born in Asia. *Id.*

6. Complaint at 6, Reynolds v. Valley Park, St. Louis County Circuit Court, Div. 13, Cause No. 06-CC-3908.

7. Molina, *supra* note 5.

8. LATINO JUSTICE PROJECT, PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, MUNICIPALITIES CONSIDERING ‘ANTI-ILLEGAL IMMIGRANT ORDINANCES,’ available at <http://pridef.org/Civil/Latino%20Justice%20Campaign.htm>

9. *Id.*

10. See VALLEY PARK, MO. ORDINANCE NO. 1708, *supra* note 2; see also HAZELTON, PA., Illegal Immigration Relief Act (July 16, 2006), available at [http://www.hazletoncity.org/2006\\_16\\_Illegal\\_Alien\\_Immigration\\_Relief\\_Act\\_Ordinance\\_Amended.pdf](http://www.hazletoncity.org/2006_16_Illegal_Alien_Immigration_Relief_Act_Ordinance_Amended.pdf).

several of the provisions set forth in the local “illegal immigration” ordinances.<sup>11</sup>

Part I of this Comment briefly describes the socio-political and jurisprudential backdrop to this recent wave of local ordinances that address “illegal” immigration. First, it points out various social and political trends that may have been the impetus of such local measures and outlines the relevant legal precedent relating to governmental classifications based on alienage, documented and undocumented, and the Equal Protection Clause of the Fourteenth Amendment. Drawing on the analysis set forth in the cases discussed in Part I, Part II of this Comment calls for strict judicial scrutiny in the Court’s Equal Protection analysis if and when the question of constitutionality of local “illegal immigration” ordinances arises.<sup>12</sup> Part II also suggests that Valley Park and other local governments will fail to provide a compelling state interest to justify their discriminatory classification based on undocumented alienage, and thus, urges the Court to find that Valley Park’s “illegal immigration” ordinance violates undocumented immigrants’ right to equal protection of the law.

## I. BACKGROUND

### A. *National Socio-Political Backdrop*

The events of 9/11 increased national economic, social and political tensions and served to renew a long-standing national debate on the status of all non-citizens generally, and the rights and obligations of undocumented aliens more specifically. United States immigration law underwent rapid changes in its scope and enforcement. Symbolizing this change in the focus of immigration regulation from economic control to national security, the enforcement wing of the Immigration and Naturalization Services became the United States Citizenship and Immigration Services in 2002, a sub-entity of the

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11. Like the Valley Park ordinance, Missouri Senate Bill No. 348 includes provisions that would prohibit landlords from renting to “illegal immigrants” and would deny state business permits and project grants to employers who knowingly hire “illegal immigrants.” Furthermore, proponents of the bill have also proposed “English Only” provisions to the legislation. S.B. 348, 94th Leg., (Mo. 2007), available at [http://www.senate.mo.gov/07info/BTS\\_Web/Bill.aspx?SessionType=R&BillID=6818](http://www.senate.mo.gov/07info/BTS_Web/Bill.aspx?SessionType=R&BillID=6818).

12. In September 2006, the Valley Park ordinances were temporarily enjoined from enforcement. Two small business owners, the Missouri Equal Housing Opportunity Counsel, Washington University School of Law Clinic, and the Saint Louis University Legal Clinic filed a complaint in the Circuit Court of St. Louis County, and the case had a trial date of March 2–3, 2007, however the City decided to forgo the expense of litigation and repealed the legislation. *Reynolds, et al. v. City of Valley Park, et al.*, St. Louis Circuit Court of St. Louis County, Division 13, Cause No. 06-CC-3802 (September 25, 2006).

Department of Homeland Security.<sup>13</sup> Since 1980, lax enforcement of federal immigration law and economic growth has brought an estimated 7 million to 20 million undocumented immigrants to the U.S.<sup>14</sup>

Because of the nature of these immigrants' entry and residence in the United States, not much demographic or reliable empirical data exists to illustrate the effects of this influx. In the absence of accurate and reliable information, misconceptions, prejudice, and spirited controversy regarding the economic, social and demographic impact of undocumented workers prevail.<sup>15</sup> In contrast to the first two centuries of American immigration, most immigrants to the United States over the last two decades come from non-European countries, predominantly from Latin America, Africa, and Asia.<sup>16</sup>

Comprehensive immigration reform has been a prominent issue in national political discourse for nearly five years. President Bush championed immigration reform for many years.<sup>17</sup> On May 15, 2006, the President addressed the nation from the Oval Office and spent thirty minutes of prime-time television promoting his plan for immigration reform, what he described as a matter of "great national importance."<sup>18</sup> Similarly, in August 2006, President Bush focused his weekend National Radio Address on national immigration issues, again pushing his agenda for comprehensive reform.<sup>19</sup> Despite all this talk, the federal government has failed to adopt immigration reform. In 2005 and 2006, the 109th Congress spent weeks debating the immigration issue and proposing various plans for reform. And yet, at the close of the winter session, Congress had reached stalemate, and in effect, passed nothing relating to immigration reform.<sup>20</sup>

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13. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002).

14. JEFFREY S. PASSEL, PEW HISPANIC CENTER, ESTIMATES OF THE SIZE AND CHARACTERISTICS OF THE UNDOCUMENTED POPULATION (March 31, 2005).

15. FEDERATION FOR AMERICAN IMMIGRATION REFORM (FAIR), "What's Wrong with Illegal Immigration?" *available at* [www.fairus.org/site/PageServer?pagename=iic\\_immigrationissuecenters7443](http://www.fairus.org/site/PageServer?pagename=iic_immigrationissuecenters7443) (indicating that illegal immigration drains taxpayer resources and has a negative effect on the "American worker"); *cf.* George J. Borjas, *The Economic Benefits of Immigration*, 9:2 THE JOURNAL OF ECONOMIC PERSPECTIVES 3 (1995); Eric S. Rothman & Thomas J. Espenshale, *Fiscal Impacts of Undocumented Immigration in the United States*, 58:3 POPULATION INDEX 381, 410 (1992).

16. *See* PASSEL, *supra* note 14.

17. Press Release White House, Fact Sheet: Fair and Secure Immigration Reform (Jan. 07, 2004), *available at* <http://www.whitehouse.gov/news/releases/2004/01/20040107-1.html>.

18. Press Release, White House, President's Radio Address (Aug. 5, 2006), *available at* <http://www.whitehouse.gov/news/releases/2006/08/20060805.html>; Press Release, White House, President Bush Addresses the Nation on Immigration Reform (May 15, 2006), *available at* <http://www.whitehouse.gov/news/releases/2006/05/20060515-8.html>.

19. *Id.*

20. Notably, in an extraordinary session, Congress passed legislation that allocates funds to construct a border wall. The Secure Fence Act of 2006, Pub.L. 109-367 (2006).

Amidst the federal debate, one proposed strategy for reform promoted local enforcement of federal immigration laws. In June 2002, nine months after September 11th, Attorney General John Ashcroft claimed that the federal government authorized state and local law enforcement officers to enforce federal immigration laws.<sup>21</sup> Courts have held that criminal violations of the Immigration and Nationality Act (INA) fall within state police powers; however, in order to enforce such violations, a local police officer must first distinguish between criminal and civil violations of the INA, a highly complicated task.<sup>22</sup> Furthermore, the Circuits are split as to whether local police enforcement of civil provisions of the INA preempted by federal law.<sup>23</sup> Adding fuel to the local action fire, bills such as the Clear Law Enforcement for Criminal Alien Removal Act (CLEAR Act)<sup>24</sup> and its Senate counterpart, the Homeland Security Enhancement Act (HSEA) proposed federal legislation to empower and strongly encourage states to employ state and local police to enforce civil immigration law. Even though these bills failed to garner enough congressional support to become law, they contributed to the trend; it was en vogue to crackdown on the “illegals” at the local level.

Failure to enforce and reform federal immigration law, coupled with a trend toward national initiatives for local enforcement, contributed to the birth of “illegal immigration” ordinances at the local level. Inaction in Washington frustrated Americans from both sides of the aisle, as the immigration debate seemed endless while the population of undocumented immigrants steadily grew.<sup>25</sup> Federal immigration regulations seemed to lag several years, perhaps more than a decade, behind the social trend. The perception that Congress was shirking its responsibility for border control and immigration regulation fomented frustration at the local level. In the name of fervent patriotism and

21. John Ashcroft, United States Attorney General, Prepared Remarks on the National Security Entry-Exit Registration System (June 6, 2002), <http://www.usdoj.gov/ag/speeches/2002/060502agpreparedremarks.htm>.

22. *Gonzales v. City of Peoria*, 722 F.2d 468 (9th Cir. 1983); *see, e.g.*, Michael M. Hethmon, *The Chimera and The Cop: Local Enforcement of Federal Immigration Law*, 8 U.D.C.L. REV. 83, 84 (2004).

23. *Gonzales*, 722 F.2d 468; *see* Jill Keblawi, *Immigration Arrests by Local Police: Inherent Authority or Inherently Pre-empted*, 53 CATH. U. L. REV. 817, 817, 833–836 (2004); *cf.* *United States v. Vasquez-Alvarez*, 176 F.3d 1294 (10th Cir. 1999).

24. The CLEAR Act, represents a move towards local enforcement of national immigration efforts. H.R. 2671, 108th Cong. (2003). It is an example of harsh measures proposed in Congress, in the name of “Homeland Security” and immigration enforcement. H.R. 2671, Cong. 108th (2003). For the first time in American history, this bill makes it a federal crime, instead of merely a civil offense, to be in the United States in violation of an immigration law or regulation. This provision could turn millions of immigrants currently in the U.S. into criminals, creating a significant hurdle in their efforts to acquire any legal status—and would effectively frustrate the proposals that would provide real immigration reform.

25. *See* PASSEL, *supra* note 14.

riding a wave of popularity, local governments dove into the arena of immigration regulation. Many proponents believed that local ordinances, such as Valley Park's, presented an effective way to send a message to Washington.<sup>26</sup>

*B. The Judicial Precedent: Undocumented Aliens and Equal Protection*

1. Equal Protection and State Discrimination Based on Alienage

The Supreme Court's treatment of state discrimination against "documented" alienage offers the background upon which this Comment will consider the Valley Park and other local "illegal immigration" ordinances. In its alienage cases, the Court indicates that the Equal Protection Clause of the Fourteenth Amendment extends to aliens. And, because aliens are a discrete and insular minority, which has been the subject of nativist animus throughout our Nation's history, state and local legislative classifications based on alienage warrant strict judicial scrutiny.

a. Chinese Exclusion and Fourteenth Amendment Protection: *Yick Wo v. Hopkins*

In 1886, the Court established that aliens are protected against discrimination under the explicit mandate of the Equal Protection Clause which provides that no "person" shall be denied equal protection of the law.<sup>27</sup> In *Yick Wo v. Hopkins*, Chinese permanent residents of California challenged the constitutionality of San Francisco ordinances that regulated the construction and conduct of laundry houses in the city.<sup>28</sup> Under the guise of the facially neutral ordinances, city officials arbitrarily denied licenses to Chinese laundry house proprietors. The Court explained, "[t]he fourteenth amendment to the constitution is not confined to the protection of citizens."<sup>29</sup> The provisions of the Fourteenth Amendment are "universal in their application, to all persons within the territorial jurisdiction" of the State.<sup>30</sup> The Court concluded that the San Francisco municipal authority had applied and administered the ordinances with "an evil eye and an unequal hand," discriminating based on "hostility to the race and nationality" of the Chinese immigrants, in violation of the Equal Protection Clause of the Fourteenth Amendment.<sup>31</sup>

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26. See Allison Retka, *Missouri's Valley Park begins its defense in barring the hiring and renting to illegal immigrants*, ST. LOUIS COUNTIAN, Oct. 11, 2006.

27. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

28. *Id.*

29. *Id.* at 369.

30. *Id.*

31. *Id.* at 373-74.

b. Racial Animus and Classifications based on Alienage: *Takahashi v. Fish and Game Commission*

In *Takahashi v. Fish and Game Commission*, the Court affirmed its application of the Fourteenth Amendment in *Yick Wo*: the Equal Protection Clause protected resident aliens against state laws which discriminated by imposing unequal burdens on aliens in the administration of local commerce.<sup>32</sup> In 1945, the California Fish and Game Commission banned the issuance of commercial fishing licenses to any “person ineligible to citizenship,” a classification that included primarily Japanese residents.<sup>33</sup> In its analysis of the California Fish and Game Code provision, the Court commented that the Fourteenth Amendment requires that state laws imposing discriminatory burdens upon alien residents must be confined within narrow limits. The Court held that California’s alleged “special interest” in conserving its natural resources was inadequate to justify the exclusion of all aliens who are lawful residents of the state from making a living by fishing off the California shores.<sup>34</sup>

Notably, in concurrence, Justice Murphy pointed out that the majority failed to adequately examine the “anti-Japanese fever” manifested in the legislation.<sup>35</sup> Justice Murphy wrote, “Legislation [designed solely to discriminate based on nationality] is not entitled to wear the cloak of constitutionality.”<sup>36</sup> After describing racial and economic tension that characterized World War II and post-war anti-Japanese sentiment in the United States, Justice Murphy criticized the California provisions as the product of the “winds of racial animosity” and noted that the provisions demonstrated an “obvious . . . attempt to legalize discrimination against Japanese alien[s] . . . .”<sup>37</sup> Murphy concluded, “We need but unbutton the seemingly innocent words of [the California Fish and Game Code provision] to discover beneath them the very negation of all the ideals of the equal protection clause.”<sup>38</sup>

c. Emergence of Strict Scrutiny for Classifications Based on Alienage

In *Graham v. Richardson* in 1971, the Court ruled that state legislative classifications based on alienage are “inherently suspect and subject to close

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32. 334 U.S. 410, 420 (1948).

33. *Id.* at 414.

34. *Id.* at 421.

35. *Id.* at 422 (Murphy, J., concurring).

36. *Id.*

37. *Takahashi*, 334 U.S. at 425–26.

38. *Id.* at 427 (Murphy, J., concurring). Justice Murphy expressed similar concerns in his dissent in *Korematsu v. United States*, 323 U.S. 214 (1945) (“Such exclusion goes over ‘the very brink of constitutional power’ and falls into the ugly abyss of racism.”).



judicial scrutiny.”<sup>39</sup> Employing a strict scrutiny standard, the Court struck down a Pennsylvania law that made non-citizens ineligible to receive public assistance and an Arizona law that placed a fifteen-year residency requirement on the receipt of public benefits.<sup>40</sup> The Court noted that *Takahashi* had indicated that “a State’s desire to preserve limited welfare benefits for its own citizens is inadequate” to justify discrimination against resident aliens.<sup>41</sup> Aliens are a “prime example of a discrete and insular minority” for whom heightened judicial review is appropriate.<sup>42</sup> In support of its strict scrutiny standard, the Court pointed out that aliens work in the state and contribute to its economic growth, and yet they exercise no right to vote.<sup>43</sup> Moreover, the Court reasoned that its decision to subject state and local legislation that denies aliens equal rights to strict scrutiny had a second constitutional underpinning. It pointed to the federal government’s primary and plenary responsibility in the field of immigration and naturalization, grounded in the Supremacy Clause<sup>44</sup> and the Naturalization power.<sup>45</sup>

Since *Graham*, the Court has repeatedly applied a strict standard of review to state and local legislative classifications based on alienage. In *Sugarman v. Dougall*, the Court declared unconstitutional a New York law that prohibited aliens from obtaining civil service jobs.<sup>46</sup> Likewise, in *Nyquist v. Mauclet*, a New York statute, which limited financial aid in higher education to citizens and those who declared their intent to become citizens, failed to survive the Court’s highest scrutiny.<sup>47</sup> Although strict scrutiny is the general rule when a state or local government discriminates against aliens, the Court has carved a narrow exception for state statutes that “confine the performance of . . . important public responsibility[ies] to [citizens of the United States].”<sup>48</sup>

Against this backdrop of equal protection jurisprudence which subjects sub-federal legislation that discriminates against “documented” aliens with strict scrutiny, the Court heard its first case in which undocumented aliens asserted their right to equal protection of the law.

39. 403 U.S. 365, 372 (1971).

40. *Id.*

41. *Id.* at 374.

42. *Id.* at 372.

43. *Id.* at 376.

44. U.S. CONST. art. VI, cl. 2.

45. U.S. CONST. art. I, § 8, cl. 4.

46. 413 U.S. 634 (1973).

47. 432 U.S. 572 (1976).

48. *Foley v. Connelie*, 435 U.S. 291, 300 (1978) (required citizenship in order to be a police officer); *see, e.g., Ambach v. Norwick*, 441 U.S. 68 (1979) (upholding a state statute requiring citizenship in order to be an elementary or secondary school teacher); *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982) (citizenship in order to be a probation officer); NORMAN REDLICH, JOHN ATTANAISSO & JOEL K. GOLDSTEIN, *CONSTITUTIONAL LAW* 856–63 (4th ed. 2002).

## 2. Equal Protection and State Discrimination against Undocumented Aliens

### a. *Plyler v. Doe*: The Court Sets Forth an Intermediate Scrutiny Standard

In 1982, an influx of undocumented immigrants presented a socioeconomic challenge similar to the circumstances giving rise to debate in our nation today.<sup>49</sup> In this context, the Court decided *Plyler v. Doe* and employed intermediate scrutiny in examining a Texas statute that required undocumented aliens pay for elementary public schools.<sup>50</sup> The *Plyler* Court declared the Texas statute unconstitutional and affirmed the broad interpretation of the Fourteenth Amendment's Equal Protection Clause, as established in *Yick Wo*. In its efforts to defend the statute, Texas argued that the Fourteenth Amendment Equal Protection Clause, unlike the Due Process Clause, directs a state to protect persons "within its jurisdiction."<sup>51</sup> Citing *Yick Wo*,<sup>52</sup> the Court dismissed such a limitation on the scope of equal protection and explained that the phrase "within its jurisdiction" does not distract from, but confirms, the understanding that "the Fourteenth Amendment extends to anyone, citizen or stranger, who is subject to the laws of a State, and reaches into every corner of a State's territory."<sup>53</sup> Justice Brennan, writing for a majority joined by Justices Marshall, Blackmun, Stevens, and Powell, emphasized that "[a]liens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments."<sup>54</sup>

Although the Court never expressly identified its method of review as an application of an intermediate scrutiny standard, the majority placed the burden of proof of the statute's constitutional validity upon Texas to provide a "substantial state interest" to justify its denial of equal rights to undocumented aliens. Moreover, Justice Powell's concurring opinion pointed out "[o]ur review in a case such as these is properly heightened," and he cited *Craig v. Boren*,<sup>55</sup> a case in which the Supreme Court articulated a standard of intermediate scrutiny for gender classifications.<sup>56</sup>

49. See *Plyler v. Doe*, 457 U.S. 202, 243, n.2 (1982) (Burger, C.J., dissenting) (noting that estimates of the number of immigrants illegal present in the United States ranged between 3 and 12 million).

50. 457 U.S. 202 (1982).

51. *Id.* at 211.

52. 118 U.S. 356 (1886).

53. *Plyler*, 457 U.S. at 215.

54. *Id.* at 210.

55. 429 U.S. 190 (1976).

56. *Plyler*, 457 U.S. at 238 (Powell, J., concurring).

In support of its heightened level of scrutiny, the Court in *Plyler* emphasized the isolated nature of the undocumented immigrant population in the United States. Justice Brennan pointed out that due to the lax enforcement of the federal laws barring entry and employment of undocumented aliens, a substantial “shadow population,” numbering in the millions, existed within the United States’ borders in the early 1980s.<sup>57</sup> The Court acknowledged that “[t]he existence of such an underclass presents a most difficult problem for a Nation that prides itself on adherence to principles of equality under the law.”<sup>58</sup> The Court expressly rejected Texas’s argument that the statute should only be subject to rational basis review, requiring the State to provide some “substantial state interest” furthered by such a classification.<sup>59</sup> At the same time, the majority refused to treat undocumented aliens as a suspect class, commenting that undocumented status was not a “constitutional irrelevancy,” and thus, refusing to apply strict scrutiny in reviewing the Texas statute.<sup>60</sup> The Court pointed out that undocumented status was not an immutable characteristic, more pointedly, the result a decision to engage in unlawful action.<sup>61</sup>

Yet another rationale to support heightened judicial scrutiny employed in *Plyler* was the importance of the “fundamental right” to education. Even though education may not qualify as a “right” granted by the Constitution, the Court noted that it is not merely “some governmental ‘benefit’ indistinguishable from other forms of social welfare legislation.”<sup>62</sup> The Court pointed out, “it hardly can be argued rationally that anyone benefits from the creation within our borders of a subclass of illiterate persons many of whom will remain in the State, adding to the problems and costs of both State and National Government attendant upon unemployment, welfare, and crime.”<sup>63</sup> Justice Marshall’s concise concurrence emphasized his argument for the protection of what he described as a “fundamental right to education” as he first articulated in *San Antonio v. Rodriguez*.<sup>64</sup> More generally, the Court’s analysis focused on the effect that the Texas statute had on the undocumented immigrant children, “special members of this underclass,” noting that the children’s unlawful presence in the United States was not a product of their own conduct, but rather the conduct of their parents.<sup>65</sup>

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57. *Id.* at 218.

58. *Id.* at 219.

59. *Id.* at 230.

60. *Plyler*, 457 U.S. at 230.

61. *Id.* at 220.

62. *Id.* at 221.

63. *Id.* at 241.

64. *Id.* at 231 (Marshall, J., concurring) (citing *San Antonio v. Rodriguez*, 411 U.S. 1 (1973)).

65. *Plyler*, 457 U.S. at 219–20.

In *Plyler*, the Court failed to discuss prejudicial and discriminatory practice based on race or national origin as an underlying impetus for the Texas statute. Nearly 80 percent of undocumented residents in Texas in 1980 were Mexican.<sup>66</sup> Unlike the Court in *Yick Wo* or in *Takahashi*, the Court in *Plyler* never alluded to anti-Latino or nativist sentiment as a subtext to local legislative classifications based on alienage. Rather, the *Plyler* Court presented an economic, class-based rationale for its decision to strike down the statute. The Court scrutinized the Texas statute because it presented the specter of creating “a permanent underclass.”<sup>67</sup>

In defense of the statute, the Court discerned several colorable state interests that the discriminatory classification allegedly furthered.<sup>68</sup> First, the State suggested that it enacted the statute to protect itself against the influx of “illegal entrants” that places a burden on the State’s limited resources.<sup>69</sup> The Court disparaged this argument and pointed out that evidence suggests that “illegal aliens underutilize public services, while contributing their labor to the local economy and tax money to the state fisc.”<sup>70</sup> Next, Texas argued that its statute protected the interest of state residents when it withheld the benefits of public education from undocumented aliens, whose presence within the United States is the product of unlawful conduct.<sup>71</sup> Texas suggested that Congress’s apparent disapproval of the presence of undocumented aliens in the United States and the aliens’ evasion of federal regulation provide Texas authority to impose “special disabilities” upon undocumented immigrants.<sup>72</sup> The Court also refused to impute to Congress an intention to allow a state to withhold education from undocumented children, suggesting that there was no national policy to support the State in denying elementary education.<sup>73</sup> Finally, citing *Graham*, the Court held that a concern for the preservation of state resources cannot justify the discriminatory classification used in allocating those resources.<sup>74</sup>

Chief Justice Burger, in dissent, argued that courts should apply a rational basis test when reviewing state or local action that affected undocumented

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66. See Jeffrey S. Passel & Karen A. Woodrow, Population Division of the U.S. Census Bureau, *Geographic Distribution of Undocumented Immigrants: Estimates of Undocumented Aliens Counted in 1980*, 18:3 INT’L IMMIG. REV. 642, 649 (1984) (noting that 147,000 of Texas estimated 186,000 undocumented residents were Mexican).

67. *Plyler*, 457 U.S. at 221.

68. *Id.* at 228.

69. *Plyler*, 457 U.S. at 228.

70. *Id.*

71. *Id.* at 219.

72. *Id.* at 224.

73. *Plyler*, 457 U.S. at 226.

74. *Id.* at 227.

aliens as a class.<sup>75</sup> The dissent emphasized that the judiciary should defer to the legislature on matters involving the allocation of state resources, especially within the state-run education system.<sup>76</sup> Chief Justice Burger suggested that the Court in *Plyler*, as “noble and compassionate” as its motives may be, abused the Fourteenth Amendment to become an “omnipotent and omniscient problem solver.”<sup>77</sup> The dissent concluded that, “the solution to this seemingly intractable problem is to defer to the political processes, unpalatable as that may be to some.”<sup>78</sup>

b. *Plyler*’s Progeny

Since *Plyler* in 1982, few cases have involved equal protection of undocumented aliens. In 1994, California voters passed a ballot initiative prohibiting persons unlawfully admitted to the United States from receiving state services.<sup>79</sup> The stated purpose of Proposition 187 was to provide “cooperation between agencies of state and local government with the federal government, and to establish a system of required notification by and between such agencies to prevent illegal aliens from receiving benefits or public services in the State of California.”<sup>80</sup> Constitutional law professor Erwin Chemerinsky hypothesized that Proposition 187 would give the Supreme Court a chance to reconsider *Plyler*, commenting that under *Plyler* the Proposition 187’s denial of education to undocumented immigrants was clearly unconstitutional and that denial of all government services—such as welfare and medical care—to undocumented immigrants was likely to be found unconstitutional.<sup>81</sup>

However, the question of constitutionality of Proposition 187 prohibitions never came before the Supreme Court of the United States. The Central District of California granted injunctive relief to bar California’s Governor and attorney general from enforcing the provisions. While pending review in the Ninth Circuit, the parties settled. The settlement permanently enjoined California from implementing and enforcing the measures set forth in California Proposition 187.

More recently, cases brought on behalf of undocumented aliens in both Georgia and New York challenged the constitutionality of state efforts to restrict the issuance of driver’s licenses to undocumented immigrants (Driver’s

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75. *Id.* at 252–53 (Burger, C.J., dissenting).

76. *Id.*

77. *Id.* at 243.

78. *Plyler*, 457 U.S. at 254.

79. *League of United Latin American Citizens v. Wilson*, 908 F. Supp. 755, 763 (C.D. Cal. 1995).

80. *Id.*

81. ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 624 (1997).

License Cases).<sup>82</sup> In *Doe No. 1 v. Georgia Department of Public Safety*, the Northern District of Georgia held that Georgia's law prohibiting the Department of Public Safety from issuing driver's licenses to undocumented and non-resident aliens did not violate the Equal Protection Clause or the constitutional right to travel.<sup>83</sup> The Georgia court looked to *Plyler* to provide a framework for its analysis, commenting that the Court found that "illegal aliens" are not a suspect class and relying on the Court's language to draw a distinction between undocumented immigrant children and adults.<sup>84</sup> The *Doe No. 1* Court examined its own case law and pointed out that "[u]nlike most of the classifications we have recognized as suspect, entry into this class, by virtue of entry into this country, is the product of voluntary action."<sup>85</sup>

In *Alaska v. Cosio*, the Supreme Court of Alaska upheld a regulation promulgated by the Commissioner of the Alaska Department of Revenue that excluded undocumented immigrants residing in Alaska from eligibility to receive dividends that were distributed from the state's permanent fund.<sup>86</sup> The court relied on *Plyler* to determine what level of scrutiny the Alaska statute warranted.<sup>87</sup> After examining the language of *Plyler*, the *Cosio* court found that the United States Supreme Court employed an "intermediate level of scrutiny" in which it reviewed the law under a "rational basis test," but required the State to "produce a 'substantial,' as opposed to merely 'legitimate' state interest."<sup>88</sup>

The *Cosio* court pointed out two reasons that support the *Plyler* Court's decision to impose intermediate scrutiny to the class of illegal aliens: (1) The Texas law at issue affected the "discrete class of children not accountable for their disabling status," and (2) the Texas law denied children a basic education.<sup>89</sup> The court then distinguished the Alaska regulation based on those two reasons, pointing out that the *Cosios* are both adults and that the right to dividend is a "matter of grace," a governmental benefit distinguishable from social welfare.<sup>90</sup> Thus, the court concluded that the Alaska dividend eligibility requirement only warranted rational basis review. As expected, under a rational basis standard, the court found that the state's regulation which excluded illegal aliens from receiving dividends from the permanent fund was

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82. *Doe No. 1 v. Georgia Dep't of Pub. Safety*, 147 F. Supp. 2d 1369 (N.D. Ga. 2001); *Cubas v. Martinez*, 819 N.Y.S.2d 10 (N.Y. App. Div. 2006).

83. *Doe No. 1*, 147 F. Supp. 2d at 1373-74.

84. *Id.* at 1372-73.

85. *Id.* at 1372.

86. 858 P.2d 621, 623 (Alaska 1993).

87. *Id.* at 626-27 ("The *Cosios*, as illegal aliens, do not automatically fall within one of the three pre-set categories.").

88. *Id.*

89. *Id.*

90. *Id.*

rationally related to a legitimate state interest because it: (1) provided a mechanism for equitable distribution of the dividend to its residents, commenting that “giving dividends to illegal aliens would contravene public policy by rewarding individuals for illegal acts”; (2) encouraged persons to maintain residence in Alaska; and (3) encouraged civic involvement and awareness in the management and expenditure of the fund.<sup>91</sup>

In conclusion, *Plyler* drew a distinction in the level of judicial scrutiny used to classifications based on “documented alienage” versus classifications based on “undocumented alienage,” noting that undocumented status was not a “constitutional irrelevancy.”<sup>92</sup> The *Plyler* Court did not treat the class of undocumented immigrants as a “suspect class,” but applied an intermediate scrutiny standard in reviewing sub-federal action that adversely affected the rights of undocumented aliens.<sup>93</sup> Absent clear judicial discouragement of such classifications and in response to social pressures and economic misconceptions, local governments, Jeffrey Whitteaker and his contemporary local leaders, have taken it upon themselves to promulgate local ordinances that address the “illegal immigration” problem. In the Summer of 2006, aggressive local legislation sprang up in pockets of this country and included broad provisions that arguably violate the constitutional mandate of equal protection of the law set forth in the Fourteenth Amendment.

## II. ANALYSIS

Valley Park’s “illegal immigration” ordinance, and other local ordinances similar to it, may provide an opportunity for the Court to re-consider its decision in *Plyler v. Doe*. Relying on the Court’s reasoning in cases examining classifications based on “documented” alienage and on Court’s analysis in *Plyler*, this Comment urges the Court to carefully scrutinize the local ordinances. Because undocumented immigrants make up a discrete and insular minority and have been the subject of historical discrimination, they, like documented aliens, should be treated as a suspect class. Moreover, local “illegal immigration” ordinances affect important rights, encroaching on non-English speaking residents’ right to free speech and denying undocumented immigrants access to housing and basic services. Thus, this Comment argues that the Court should employ strict scrutiny if and when it reviews local “illegal immigration” ordinances. Finally, under an equal protection framework of analysis, this Comment suggests that Valley Park, and presumably other state and local governments, will fail to identify a compelling state interest that such legislation furthers.

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91. *Cosio*, 858 P.2d at 627–28.

92. *Plyler*, 457 U.S. at 224.

93. *Id.*

A. *Threshold Issue: Scope of the Equal Protection Clause*

The Equal Protection Clause of the Fourteenth Amendment provides “no person” shall be denied equal protection of the law.<sup>94</sup> Unlike the Privileges and Immunities Clause also set forth in Section One of the Fourteenth Amendment, the Equal Protection Clause does not employ the word “citizen” to describe the subjects of its general protections.<sup>95</sup> Notably, the word “person” is not limited by any language that would indicate that a “person” must be legally present within the United States in order to avail herself of her right to equal protection of the laws. In *Plyler*, the Court affirmed this textual interpretation of the language of the Fourteenth Amendment, referencing precedent that had extended due process and equal protection rights to all persons, regardless of their immigration status.<sup>96</sup> Thus, a textual interpretation of the Equal Protection Clause indicates that undocumented aliens residing in the United States may avail themselves of its protections.

B. *State and Local Legislative Classifications That Discriminate Based on Alienage, Whether Documented or Undocumented, Should Be Subject To Strict Scrutiny*

The primary purpose of the Fourteenth Amendment was to protect African Americans against the harms of racial prejudice that had plagued the United States since its inception.<sup>97</sup> However, we also know that the drafters of the Amendment chose to use general language not tied to race as a means of expanding the scope of the Fourteenth Amendment’s protections.<sup>98</sup> Legislative classifications based on race present the “core case” of discriminatory classification that warrant strict judicial scrutiny in equal protection.<sup>99</sup> However, the general language of the Equal Protection Clause allows other groups to vindicate their right to equality under the law.<sup>100</sup> The Court has identified many justifications for its heightened review of discriminatory classifications. In the case of classifications based on alienage, the Court relied on an important rationale for applying a strict standard of review: aliens are a discrete and insular minority that is politically powerless.<sup>101</sup> Moreover, the Court’s jurisprudence, including its rationale in cases like *Yick Wo* and

94. U.S. CONST., amend. XIV, § 1, cl. 4.

95. U.S. CONST., amend. XIV, § 1, cl. 2.

96. *Plyler*, 457 U.S. at 214, n.13.

97. *Id.* at n.13; CHEMERINSKY, *supra* note 81, at 551.

98. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 30 (1980) (citing Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 44–45 (1955)).

99. *See id.* at 31.

100. *Id.*

101. *Graham v. Richardson*, 403 U.S. 365, 372 (1971).



*Takahashi*, emphasizes that a history of discrimination against a particular group may indicate that a legislative classification, even if facially neutral, may be based on stereotypes or prejudices.<sup>102</sup> In *Plyler*, the Court focused on the vulnerability of the children of undocumented immigrants affected by state discriminatory action and the importance of the right to education. At times the Court has emphasized immutability of the trait upon which the class is drawn as a reason to scrutinize the discriminatory classification.<sup>103</sup>

With these justifications in mind, this Comment argues that state and local legislation that discriminates on the basis of undocumented status should be subject to close and searching judicial scrutiny.

a. Alienated from the Political Process: Undocumented Aliens, a Discrete and Insular Minority

In *Carolene Products*' celebrated footnote four, Justice Stone suggested that, although the Court would presume the constitutionality of most legislation, there are three instances where heightened judicial scrutiny may be necessary under the general prohibitions of the Fourteenth Amendment.<sup>104</sup> In the third of these three instances, proposed in the final paragraph of the footnote, Justice Stone noted that legislation affecting the rights of a "discrete and insular" minority demanded "more searching judicial inquiry."<sup>105</sup> Justice Stone reasoned that the special condition of such discrete and insular groups "tends to seriously curtail the operation of the political processes ordinarily to be relied upon to protect minorities." Professor John Hart Ely described *Carolene Products* footnote four as a blueprint for much of the Warren Court's constitutional analysis.<sup>106</sup> The role of the judicial branch is to protect against the legislature's tendency to want to separate the "rulers from the ruled."<sup>107</sup> Ely noted that important Warren Court decisions "insisting on equal treatment for society's habitually unequals: notably, racial minorities, but also, aliens, 'illegitimates,' and poor people,"<sup>108</sup> implicitly accepting Justice Stone's mandate for heightened judicial scrutiny when legislation adversely affects the rights of those whom the political process fails to protect.

Identification of documented aliens as a discrete and insular group was an important rationale in the Court's decision to apply strict scrutiny in evaluating

102. See, e.g., *Craig v. Boren*, 429 U.S. 190 (1971); see also CHEMERINSKY, *supra* note 81, at 551, 604.

103. See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973); *Plyler*, 457 U.S. at 241-45 (Burger, C.J., dissenting).

104. *United States v. Carolene Products Co.*, 304 U.S. 144, 153 (1938).

105. *Id.*

106. ELY, *supra* note 98; see also, REDLICH, ATTANASIO & GOLDSTEIN, *supra* note 48, at 492.

107. ELY, *supra* note 98, at 78.

108. *Id.*

the constitutionality of state legislation that discriminated based on alienage. In *Graham v. Richardson*, the Court cited *Carolene Products*' footnote four and described "documented" aliens as a "prime example of a 'discrete and insular' minority" because they enjoyed no right to vote.<sup>109</sup> Similarly, undocumented aliens are excluded from the political process. As Justice Brennan described in *Plyler*, undocumented aliens are America's "shadow population."<sup>110</sup> As in 1982, the estimated number of undocumented immigrants residing in the United States today is well into the millions people.<sup>111</sup> Each of these millions of persons resides in the United States and is subject to federal, state and local law, but cannot protect herself via the political process. Because aliens enjoy no right to vote, the political process is unlikely to protect aliens' interest, documented or undocumented. Because of their insular condition and exclusion from the polls, undocumented aliens find it difficult to create political alliances to affect governmental change. Although the social, cultural or familial relationships of undocumented aliens may align their interests with the those of documented aliens, they gain little political clout by allying with another disenfranchised group.

Moreover, the majority of America's undocumented immigrants come from Latin America, Africa and Asia. Thus, undocumented immigrants are likely to be racial minorities as well as newcomers. Racial minorities and non-residents are paradigmatically powerless classes.<sup>112</sup> Because of their vulnerability and inability to vote, undocumented immigrants are ideal scapegoats for the political, economic and social woes of our Nation. As racial minorities and newcomers, undocumented immigrants encounter a double barrier to entry in the political process, making them extremely vulnerable to the will of the majority and thus, a prime example of a discrete and insular class which careful and exacting judicial review should protect.

b. Cloak of Constitutionality: Remembering Justice Murphy, An On-going History of Anti-Immigrant and Racial Animus

Because the Fourteenth Amendment's primary purpose was to protect African Americans, the Court has emphasized that a history of discrimination against a class of persons makes it likely that the classification will be based on stereotypes and prejudices.<sup>113</sup> Thus, a classification that adversely affects the rights of a group that has historically been the subject of discrimination is likely to warrant the most exacting standard of judicial scrutiny.<sup>114</sup> In cases

109. 403 U.S. 365, 372 (1971).

110. *Plyler*, 457 U.S. at 218.

111. See, PASSEL *supra* note 14.

112. See CHEMERINSKY *supra* note 81, at 619.

113. See REDLICH, ET. AL., *supra* note 48.

114. CHEMERINSKY, *supra* note 81, at 551.

decided in the late nineteenth and early twentieth centuries, like *Yick Wo*, *Korematsu*, and *Takahashi*, the Court seemed to take anti-immigrant sentiment into account as it considered the constitutionality of state action that affected the rights of resident aliens. Justice Murphy in his concurrence in *Takahashi* and in his dissent in *Korematsu* warned against the “winds of racial animus” that state and local discrimination attempted to “cloak in the constitutionality” of classifications based on alienage.<sup>115</sup> The Court in *Plyler* seemed to overlook the anti-discrimination and nativist principles that are at the heart of the alienage cases that have traditionally protected the noncitizens at the sub-federal level.

The Court in *Plyler* made no mention of racist or anti-immigrant sentiment as a motivating force behind the state law that denied undocumented immigrant children access to public education. Twenty-four years after *Plyler*, the Court’s message that state laws like Texas’s violated Equal Protection failed to deter state and local officials in towns like Valley Park. I do not presume to assert that the Court should have included such reasoning in its decision to employ an intermediate standard in *Plyler*, but rather, what I do suggest is that anti-immigrant and racist sentiments cannot be ignored if and when the Court considers ordinances such as Valley Park’s. The local ordinances include preambles that indict immigrants for a host of social ills without substantiation. Moreover, the measures that local “illegal immigration” ordinances set forth are far more aggressive than the Texas statute at issue in *Plyler*. As the Court suggested in *Yick Wo*, local ordinances that create legislative classifications based on “hostility to the race and nationality” and tend to be implemented with “an evil eye and an unequal hand” violate the Equal Protection Clause of the Fourteenth Amendment.<sup>116</sup>

The non-recognition of discrimination based on nativism obscures current and historical patterns of discrimination directed against Latinos and other recent immigrants, who belong to racial minorities. Michael Wishnie, Assistant Professor of Clinical Law at New York University, suggests the Court should be particularly concerned about anti-immigration discrimination at the state and local level because local anti-foreign movements have an

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115. *Takahashi*, 334 U.S. at 422 (Murphy, J., concurring).

116. *Id.* at 372.

extensive history.<sup>117</sup> Nativism has been one of the most sustained social movements in the U.S., spanning more than 150 years.<sup>118</sup>

Racial prejudice or economic protectionism often motivate anti-immigrant legislation.<sup>119</sup> Historically, economic and labor concerns have strongly influenced the strength of nativist sentiment expressed in American political discourse.<sup>120</sup> Rene Galindo and Jami Vigil have observed that “[n]ativism becomes especially rampant during times of national stress and fear, and in times of war, economic recession, or demographic shifts stemming from unwanted immigration.”<sup>121</sup> Galindo and Vigil suspect that restrictive local legislation may be a response to these nativist fears, a threat to what they identify as the “core culture.”<sup>122</sup> In the wake of 9/11, fears of “foreign” attack on American soil and American economy generated a new wave of anti-immigrant sentiment. Drawing attention to nativism as a term, ideology, and political practice will make visible previous and current patterns of prejudice and discrimination directed against immigrants.

While racism and nativism are two distinct ideas, they are inexorably linked when discussing modern American anti-immigrant attitudes. Racism and nativism overlap in complex ways. The racial and ethnic makeup of the current immigrants to the United States has increased the volatility and sometimes vitriolic discourse of the immigration debate. Classifications based on immigration status may be more likely to reflect racial prejudice than nativism. Unlike the European immigrants who were targets of nativism at the turn of the century, the nativism directed against a group of immigrants who are predominantly “people of color” from Latin America and other non-European countries.<sup>123</sup> The race and ethnicity of these recent immigrants illuminates the complicated collision of socio-political phenomena that fosters powerful modern nativism, “an intersection of racism and defensive

117. Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 555 (2001). Wishnie also points out that, unlike in Washington where the foreign affairs “establishment” protects against abusive anti-immigrant legislation, local governments provide no “virtual representation” to non-citizen, foreign born residents. *Id.*

118. Rene Galindo & Jami Vigil, *Are Anti-Immigrant Statements Racist or Nativist? What Difference Does It Make?*, 4:4 LATINO STUDIES 419, 422 (2006) (citing DALE KNOBEL, *AMERICA FOR AMERICANS: THE NATIVIST MOVEMENT IN THE UNITED STATES* (1996)).

119. CHEMERINSKY, *supra* note 81, at 551.

120. Emilie Cooper, *Embedded Immigrant Exceptionalism: An Examination of California’s Proposition 187, The 1996 Welfare Reforms and the Anti-Immigrant Sentiment Expressed Therein*, 18 GEO. IMMIGR. L.J. 345, 363 (2004).

121. Galindo & Vigil, *supra* note 118, at 423.

122. *Id.*

123. See PASSEL, *supra* note 14.

nationalism.”<sup>124</sup> As Professor Gerald L. Neuman has observed, “[t]he campaign for ‘Control Our Borders’ is partly a struggle for the future racial, linguistic and cultural development of American society.”<sup>125</sup>

Pervasive forms of discrimination mark a long history of Latino, especially Mexican, immigration to the United States.<sup>126</sup> Events such as “Operation Wetback,” the Zoot Suit Riot, and the struggle for the rights of the migrant farm workers in the American West illustrate the turbulent history of the Latino immigrant in the United States. Richard Delgado argues that American society has often treated Latinos as “undesirable, unwholesome, and foreign,” and many times these discriminatory attitudes influence U.S. immigration policy and nationalist discourse.<sup>127</sup>

Many opponents to the Valley Park ordinance alleged that the real motivation for the ordinance is racial animus towards Latinos.<sup>128</sup> Reports indicate that the ordinance has driven foreign looking and foreign sounding residents out of Valley Park.<sup>129</sup> Hector Molina described Valley Park’s “illegal immigration” ordinance as an effort to “keep all the brown people out” and to “villianize the Hispanic population” of the small municipality.<sup>130</sup> The preamble to the ordinance indicts illegal immigrants for a host of social ills. It provides: “illegal immigration leads to higher crime rates, contributes to overcrowded classrooms and failing schools, and destroys our neighborhoods and diminishes our overall quality of life . . . .”<sup>131</sup> Prior to the enactment of the ordinance, there is no evidence that any of the city officials engaged in investigation or research to identify the effects of illegal immigration on crime rates, educational opportunities, neighborhoods or quality of life.<sup>132</sup> In statements to the media, Mayor Whitteaker explained the ordinances as “preventative maintenance,” a means of “protecting [his] community” against

124. Rene Galindo & Jami Vigil, *Are Anti-Immigrant Statements Racist or Nativist? What Difference Does It Make?* 4:4 LATINO STUDIES 419, 420 (2006); see generally, Richard Delgado, *Locating Latinos in The Field of Civil Rights: Assessing the Neoliberal Case For Radical Exclusion*, 83 TEX. L. REV. 489 (2004).

125. GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS AND FUNDAMENTAL LAW* 187 (1996).

126. See Richard Delgado, *Rodrigo Roundelay: Hernandez v. Texas and The Interest-Convergence Dilemma*, 41 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 23 (2006).

127. *Id.* at 492–94 (discussing “Operation Wetback,” *Texas v. Hernandez* and the prevalence of English Only movements as social forces building into the “New Nativism” of 1980 through today).

128. Molina, *supra* note 5.

129. *Id.*; Stephen Deere, *Religious Leader Rally Against Anti-Immigrant Ordinance*, ST. LOUIS POST-DISPATCH, Oct. 11, 2006, at B1.

130. Molina, *supra* note 5.

131. VALLEY PARK, MO., ORDINANCE NO. 1708.

132. Complaint at 7, *Reynolds v. Valley Park*, *supra* note 6.

the perceived threat of “illegal immigration.”<sup>133</sup> City officials admitted that they had no knowledge as to whether “illegal immigrants” resided in Valley Park.<sup>134</sup>

Moreover, the Valley Park “illegal immigration” ordinance’s vague language and enforcement mechanisms of the local ordinances invite racial profiling and implicitly promote employment and housing decisions based on invidious stereotypes and social prejudice. Local police rapidly began enforcing the provisions of the ordinance, attempting to identify “illegal immigrants,” a complicated and technical charge. Community residents report that in the days after the ordinance took effect in Valley Park, anyone who appeared Hispanic had to be prepared to present their “papers.”<sup>135</sup> Because the vague language of Valley Park’s ordinance, and other local ordinances like it, fails to set forth definitions of “illegal immigrant” and fails to provide for training of local enforcement officials in to aid in identifying immigration status and interpreting immigration documents, it implicitly encourages racial profiling as an efficient way to enforce its regulations.<sup>136</sup>

Furthermore, the Valley Park ordinance forces landlords and business owners to evaluate the immigration status of their tenants and employees without providing the tools necessary to identify immigration documents. The “illegal immigration” ordinance gives members of the local community a legal guise under which they may take it upon themselves to be the immigration officials, allowing anti-immigrant and racial stereotypes to masquerade as law-abiding behavior. Under these circumstances, a reasonable, yet uninformed, landlord in Valley Park may refuse to rent housing to a family with a Latino surname because he does not have the tools to decipher whether the renters’ “papers” are valid and because he would rather refuse the potential tenant than bear the risk of \$500 municipal fine. Similarly, a reasonable Valley Park employer may refuse to hire a woman who speaks English with an accent because the employer was not equipped with the technology to decipher if her social security card was valid. Faced with the penalties set forth in Valley Park’s ordinance, the employer may prefer to hire another candidate than to bear the risk of losing his business permit in addition to a \$1,000 municipal fine.

This difficult intersection of racist and anti-immigrant animus surrounding the adoption of Valley Park’s ordinance and the harsh, unfounded language employed in the preamble beg the question: Is the “disadvantage imposed born

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133. Stephen Deere, *Valley Park Follows Lead on Illegal Alien Law*, ST. LOUIS POST-DISPATCH, Aug. 19, 2006, at B1.

134. Complaint at 8, *Reynolds v. Valley Park*, *supra* note 6.

135. Molina, *supra* note 5.

136. Amended Complaint at 8, *Reynolds, et al. v. City of Valley Park, et al.*, *supra* note 6.

of animosity toward the class of persons affected?”<sup>137</sup> The Court needs to send a clear and convincing message to state and local legislature, and to the nation, that such nativist and arguably racist legislation is intolerable and cannot mask itself in the cloak of constitutionality by labeling the victims of discrimination, “illegals.” A history of discrimination based on race and immigrant status is yet another reason that the Court should analyze the Valley Park “illegal immigration” ordinance, and ordinances similar to it, under a standard of strict scrutiny.

c. A Response to the Immutability Critique

A common critique of a heightened scrutiny standard of judicial review of state and local law that discriminates against undocumented alienage is that illegal status is not an immutable characteristic like race or gender.<sup>138</sup> And, like prisoners, undocumented aliens are law-breakers by choice, and thus, do not demand special judicial protection when legal classifications adversely affect their rights.

However, the immutable characteristic rationale in equal protection analysis is especially tenuous. First, many groups where membership is the result of a voluntary decision are treated as “suspect classes.” For example, which religion one chooses to practice is not an immutable characteristic, but it is well-established that laws that discriminate against religious minorities are subject to strict scrutiny.<sup>139</sup> Similarly, documented aliens become residents of this country ostensibly by choice, and yet, laws that discriminate against them as a class are also subject to strict scrutiny. Conversely, many classifications based on immutable characteristics are not subject to strict scrutiny. For example, classifications based on age are reviewed under a rational basis standard.<sup>140</sup>

Secondly, as the Court emphasized in *Plyler* not all undocumented aliens are illegally present by choice.<sup>141</sup> Many families migrate together, and thus, the class of undocumented aliens includes many minor children who are present illegally in the United States as a result of their parents decision. Their membership in the class is as voluntary as a child’s choice to join the class comprised of “illegitimate children.”<sup>142</sup> State and local legislation that denies undocumented immigrants access to housing and basic services as a class inevitably adversely affect the rights of children that are a members of that class, not by choice, but as a consequence of their parents’ decisions.

137. *Romer v. Evans*, 517 U.S. 620, 628 (1996).

138. *See, e.g.,* CHEMERINSKY, *supra* note 81, at 551.

139. *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938).

140. *See* CHEMERINSKY, *supra* note 81, at 551.

141. *Plyler*, 432 U.S. at 202.

142. *Id.* at 238 (Powell, J., concurring).

According to Chief Justice Rehnquist's and other's critique, U.S. residency, either documented or undocumented is a choice, and thus, the Court should review governmental classification based on alienage employing a rational basis standard. The argument is: If aliens want to avoid state or local discrimination, they may simply move, alienage is mutable. This argument fails to recognize that all U.S. residency is presumably a choice, and, any U.S. resident, citizen and alien alike, who feels violated by a government discrimination could move out of the jurisdiction of the governmental body whose action adversely affects his rights.

## 2. Marshall's Focus: the Importance of the Right that is Adversely Affected

In reasoning that heightened scrutiny was necessary in *Plyler*, the Court, and especially Justice Marshall in concurrence, focused on the constitutional and social importance of the "right" which the Texas statute adversely affected.<sup>143</sup> The Court emphasized the importance of the "right" to elementary public education and disparaged the specter of creating a permanent "underclass" by depriving undocumented alien children of that important, perhaps not fundamental, "right."<sup>144</sup> Accordingly, the Driver's License Cases distinguished *Plyler* when they pointed out that the right to have a state driver's license was not an important right like the right to education, and thus, denial of a driver's license did not warrant heightened scrutiny.<sup>145</sup>

When and if the Court considers Valley Park's and other similar "illegal immigration" ordinances, the difficult, and in many respects unanswered, question is: which values qualify as sufficiently important or fundamental to be vindicated by the Court against other values affirmed by legislative acts?<sup>146</sup> This section suggests that the "right"<sup>147</sup> to education and housing, the First Amendment right to free speech, and the right to equal access to police protection are important, inalienable rights, which should be protected by the judiciary in its exercise of exacting judicial review.

143. *Id.* at 218 (Marshall, J., concurring).

144. *Id.*

145. *See infra* Part I.B.2b.

146. ELY, *supra* note 98, at 43 (citing ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 55 (1962)); *See* REDLICH, ATTANASIO & GOLDSTEIN, *supra* note 48, at 855, commenting that in the 1960s and 1970s the Court moved toward Equal Protection analysis that afforded special protection to "fundamental rights," including the right to education. However, this line of fundamental-rights reasoning seems to have been largely dormant for many years.

147. Although the Court has not consistently recognized a fundamental right to free public education, it has focused on the importance of education in both *Plyler* and *San Antonio v. Rodriguez*. Thus, this section will discuss an important "right" to education without suggesting that the Court would define the right as "fundamental."



a. Right to Education and Housing

The Valley Park ordinance adversely affects a number of important, if not fundamental, rights. The *Plyler* Court's concerns are again brought to bear; if no undocumented immigrant may rent or lease property in Valley Park, children of undocumented immigrants will be denied access to housing in Valley Park and thus, excluded from Valley Park public schools. As the Court suggested in *Plyler*, because the Valley Park and other similar ordinances, deny undocumented immigrants access to housing and education, they present the specter of creating a permanent, uneducated and transient underclass.

Furthermore, a person's right to the "necessities of life," to non-emergency health care and to adequate housing may be on par with the level of importance the *Plyer* Court placed on education.<sup>148</sup> The lack of adequate housing, health care and basic services contributes to the creation of an impoverished underclass. Valley Park and other "illegal immigration" ordinances affect a wide range of rights from obtaining housing and basic services, whether offered by the state or by a private resident or business, to speaking Spanish at city meetings or at work.

b. First Amendment Right to Free Speech

Section Four of the Valley Park Ordinance requires that "all official city business, forms documents, signage, telecommunication or electronic communication devices will be conducted or written in or utilize English only."<sup>149</sup> This "English Only" provision of the ordinance impinges on the fundamental right to free of speech, of all non-English speaking Valley Park residents, not just the rights of the residents who the ordinance defines as "illegal immigrants."<sup>150</sup> Generally, "English Only" laws, which declare English to be the government's official language and bar government employees from providing non-English language assistance and services, are inconsistent with both the First Amendment right to communicate with or petition the government and with the Equal Protection Clause.<sup>151</sup>

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148. See *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974). The Court struck down an Arizona statute that required an indigent to establish residency in the county before receiving non-emergency treatment in a public hospital. Characterizing the residency requirement as a penalty on the right to migrate, the Court applied a strict scrutiny standard and found that Arizona failed to set forth a compelling state interest. *Id.* at 261.

149. VALLEY PARK, MO., Ordinance No. 1708, available at: <http://www.valleyparkmo.org/docs/ordinance%201708.pdf>

150. *Ruiz v. Hall*, 957 P.2d 984 (1998), cert. denied 525 U.S. 1093 (1999).

151. *Ruiz*, 957 P.2d 954; see also, *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997) (declaring suit out of the Ninth Circuit moot and never addressing the merits of state employee's claim that English Only amendment to the Arizona constitution was overly broad and violated the First Amendment of the Federal Constitution).

In *Ruiz v. Hull*, the Arizona Supreme Court held that a state constitutional amendment that required state and local governmental agencies to act only in English was unconstitutional, violating both the First Amendment and the Equal Protection Clause.<sup>152</sup> In the court's view, the state constitutional amendment violated the First Amendment because it impinged on the constitutional rights of non-English speakers who sought to obtain access to their state and local governments and limited the political speech of elected officials and public employees.<sup>153</sup> The court found that the amendment also violated the Equal Protection Clause by burdening the core First Amendment rights of a specific class without advancing materially a legitimate state interest.<sup>154</sup> Consequently, strict scrutiny applied, and the state's desire to promote a common language was not sufficiently compelling to justify the prohibition of protected speech.<sup>155</sup> The state can promote English without prohibiting the use of other languages by state and local governments.<sup>156</sup> Thus, the Arizona Supreme Court reversed the trial court, and held that the state constitutional amendment was unconstitutional.

Like the Arizona amendment, the language of Valley Park's ordinance is overly broad and unconstitutionally vague, and thus, in violation of the First Amendment. It would prevent a city employee from speaking any language other than English in any communication relating to her employment responsibilities. The ordinance fails to set forth exceptions to the "English Only" provision for emergency services, access to municipal courts or town meetings.<sup>157</sup>

In addition to its violation of the First Amendment, the "English Only" provision of the "illegal immigration" ordinance is dangerous to both individuals and the public.<sup>158</sup> A Valley Park resident, notwithstanding his immigration status, would be in violation of the ordinance when he requests to file a complaint against a city employee in Spanish or defends against a traffic ticket in municipal court while speaking through a translator, notwithstanding

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152. *Ruiz*, 957 P.2d at 987.

153. *Id.*

154. *Id.*

155. *Id.* at 987, 991.

156. *Id.* (The court noted that unlike English-only provisions enacted in other states, this amendment specifically and broadly prohibited governmental employees from using a language other than English even when they communicated with people who had little or no knowledge of English. Therefore, the amendment was too broad, as it would prohibit a teacher from discussing a child's education with Spanish-speaking parents in Spanish, and it would also prohibit a town hall discussion between citizens and elected officials in Spanish. Contrary to the trial court's decision, this amendment was not a content-neutral time, place, or manner restriction).

157. Ordinance No. 1708, *supra* note 2.

158. See AMERICAN CIVIL LIBERTIES UNION, THE RIGHTS OF IMMIGRANTS- AN ACLU POSITION PAPER (2001), <http://www.aclu.org/immigrants/gen/11713pub20000908.html>.

his inability to communicate and comprehend English.<sup>159</sup> If a number of Valley Park's residents are unable to access emergency services, important town meetings, or municipal courts, Valley Park's safety and general community welfare are at risk. Thus, Valley Park's "illegal immigration" ordinance, and other state and local legislation that set forth "English Only" provisions, encroach on the First Amendment right to free speech of non-English speaking residents and put the safety and welfare of the state or local community at risk, and accordingly, demand heightened judicial review.<sup>160</sup>

### 3. Equal Access to Police Protection

The chilling effect of local ordinances such as that of Valley Park continues to play out. Notably, access to police protection is an especially pressing concern. Enforcement of the "illegal immigration" ordinance burdens the limited fiscal and human resources of local police departments. Hastily-adopted local ordinances like Valley Park's thrust local law enforcement officials into a dual role—police protector and immigration agent. Such a dual role may force undocumented immigrants to choose between access to police services and the "pain of deportation."<sup>161</sup> In other words, crime victims would avail themselves of police protection only if they were willing to risk the penalty of deportation. Additionally, crime witnesses may fear coming forward with information.<sup>162</sup> Moreover, many undocumented immigrants are part of communities and families that consist of a combination of undocumented immigrants, legal permanent residents, individuals with temporary lawful status and U.S. citizens.<sup>163</sup> Thus, entire families and communities, especially immigrant neighborhoods, may display an aversion

159. See Daniel J. Rearick, *Reaching Out to the Most Insular Minorities: A Proposal for Improving Latino Access to the American Legal System*, 39 HARV. C.R.-C.L. L. REV. 543 (2004).

160. See David Michael Miller, *Assimilate Me. It's As Easy As (Getting Rid Of) Uno, Dos, Tres*, 74 UMKC L. REV. 455 (2005) (discussing the constitutionality and public policy effects of a bill proposed in Congress (H.R. 997, the English Unity Act of 2005) that would provide an "English Only" law at the federal level).

161. See Theodore W. Maya, Comment, *To Serve and Protect or to Betray and Neglect?: The LAPD and Undocumented Immigrants*, 49 UCLA L. REV. 1611, 1637 (2002).

162. The NOW Legal Defense Fund reports that fear of deportation is the most significant barrier in reporting domestic abuse of women. *Clear Law Enforcement for Criminal Alien Removal Act of 2003 (H.R. 2671): Hearing Before Subcomm. on Immigration, Border, Security, and Claims of the H. Comm. on the Judiciary*, 108th Cong. 181 (2003) (report submitted by Katherine Culliton, Legislative Staff Attorney, Mexican American Legal Defense and Education Fund (MALDEF) "MALDEF Opposes Using First Responders To Enforce Federal Civil Immigration Laws").

163. Michael E. Fix & Wendy Zimmermann, *ALL UNDER ONE ROOF: MIXED STATUS OF FAMILIES IN AN ERA OF REFORM* (1999), <http://www.urban.org/publications/409100.html>.

for dealing with the police due to a fear that some residents may be subject to penalties as a result of their “illegal” status.<sup>164</sup>

### C. Colorable Compelling State Interests

If Valley Park’s, or other local legislatures’, “illegal immigration” ordinance is to survive heightened judicial scrutiny, it must meet the burden imposed under strict scrutiny: it must produce evidence that the ordinance furthers a compelling state interest. As Professor Ely has suggested, if “political officials have chosen to provide or protect X for some people (generally people like themselves), they had better make sure that everyone was being similarly accommodated or be prepared to explain pretty convincingly why not.”<sup>165</sup> One can identify various colorable local interests that Valley Park officials have presented or are likely to present.<sup>166</sup>

#### 1. Preservation of Local Resources for Legal Residents

First, as set forth in the text of the ordinance, Valley Park argues that deterring illegal immigration is within its police powers because it has an interest in protecting its citizens and its limited resources against an influx of “illegal” residents. A state or local government has a valid interest in preserving the fiscal integrity of its programs, but a state cannot accomplish such a purpose by invidious distinctions between classes of residents.<sup>167</sup> The text of the revised Valley Park ordinance relating to illegal immigration sets forth: “Illegal immigration leads to higher crime rates, subjects our hospitals to fiscal hardship and legal residents to substandard quality of care, contributes to other burdens on public services, increasing their costs and diminishing their availability to legal residents, and diminishes our overall quality of life and provides concerns to the security and safety of the homeland.”<sup>168</sup> Valley Park has failed to provide empirical evidence to support such broad allegations regarding the effect of illegal immigration on its community, or on other local

164. See generally Tiffany Walters Kleinhart, Note and Comment, *Local and State Enforcement of Immigration Law: An Equal Protection Analysis*, 55 DEPAUL L. REV. 1103, 1120–1122 (2006).

165. ELY, *supra* note 98, at 74.

166. MO. REV. STAT. § 79.110 (2000). Pursuant to MO. REV. STAT. § 79.110, the City of Valley Park has police powers as delegated by the state. Local governments have the power to enact only those ordinance “not repugnant to the constitution and laws of this state, and as such they shall deem expedient for the good government of the city, the preservation of peace and good order, the benefit of trade and commerce and the health of the inhabitants thereof . . .”

167. See *Plyler*, 457 U.S. at 225; See also *Graham v. Richardson*, 403 U.S. 365, 374–75 (1971) (citing *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969)).

168. Ordinance No. 1715, available at <http://www.valleyparkmo.org/docs/Ordinances/ordinance1715.pdf>

communities.<sup>169</sup> Moreover, it appears that Valley Park officials merely copied the text of Hazelton, Pennsylvania's ordinance without conducting any local economic or social research. As evidence of this copycat drafting process, the Valley Park ordinance includes a provision that it wishes to relieve its hospitals of "fiscal hardship" and prevent them from providing "substandard care."<sup>170</sup> Curiously, there are no hospitals in Valley Park.<sup>171</sup>

Furthermore, even if Valley Park manages to provide empirical evidence of a negative impact of illegal immigration on the city fisc, *Plyler* held that local efforts to preserve resources for its legal residents was "insufficient" to justify discriminating against undocumented children. In other words, preservation of state resources in education, and presumably other state services, fails an intermediate scrutiny standard.<sup>172</sup> Accordingly, Valley Park's colorable interest in preserving local resources is not compelling, and thus, fails to meet the burden of heightened judicial scrutiny.

## 2. Federal Government's Failure to Enforce Immigration Law Forced Valley Park to Regulate

In statements to the media, Valley Park has argued that because the federal government has failed to thwart the growth of the undocumented immigrant population in the United States, state and local regulation of immigration is necessary.<sup>173</sup> Again, the Court addressed this state interest argument in *Plyler*.<sup>174</sup> It noted that the federal government possesses the plenary power to regulate immigration and naturalization. Moreover, Valley Park argues for a dangerous public policy precedent when it claims that state and local governments may intervene because the federal government has abdicated its responsibility to regulate. The rule that Valley Park seems to suggest is: where a state or municipality subjectively decides that the federal government has failed to regulate an area under its purview, the state or local government may usurp the federal power. The danger in Valley Park's logic becomes obvious if the proposed rule is applied to Congress's plenary power to declare war.<sup>175</sup> Certainly, Valley Park would not argue that it could usurp the power to declare

169. Complaint at 7, *Reynolds v. City of Valley Park*, *supra* note 6.

170. Ordinance No. 1715, *supra* note 168.

171. Complaint at 8, *Reynolds*, et al. v. City of Valley Park, *supra* note 6.

172. *Plyler*, 457 U.S. at 226.

173. See 6:00 *Nightly News* (KMOV-CBS television broadcast Feb. 6, 2007) (quoting Mayor Jeffrey Whitteaker); See also, Scott Luach, *Kobach touts viability of Bill in Missouri*, DAILY RECORD (Kansas City, Mo.), Feb. 7, 2007 (quoting Kris Kobach, law professor from University of Missouri-Kansas City law school, who has agreed to represent the city of Valley Park in its defense of the ordinance); Allison Retka, *Missouri's Valley Park begins its defense in barring the hiring and renting to illegal immigrants*, ST. LOUIS COUNTIAN, Oct. 27, 2006.

174. *Plyler*, 457 U.S. at 225.

175. U.S. CONST., art. I, § 8, cl. 11.

war if it determined that Congress had failed to protect the nation against a foreign threat.

### 3. Encroachment in a Realm of Plenary Federal Power: A Note on Federal Preemption

In *Graham v. Richardson*, as well as in *Plyler*, the Court pointed to the federal government's plenary power to regulate immigration as an element in its decision to sharpen its scrutiny of state legislation that affected the rights of undocumented and documented aliens, respectively.<sup>176</sup> The Immigration and Nationality Act (INA)<sup>177</sup> is generally understood to preempt<sup>178</sup> most state or local immigration regulation, however, neither the language of the INA nor the decisions of the Supreme Court indicate that "every state enactment which in any way deals with aliens is a regulation of immigration and thus *per se* pre-empted . . . ."<sup>179</sup>

The Supreme Court held in *DeCanas v. Bica*, that where a state exercise its police powers to regulate matters that have some attenuated effect on immigration, "absent congressional action," such state action does not constitute "an invalid state incursion on federal power."<sup>180</sup> Language in the

176. *Graham*, 403 U.S. at 372; *Plyler*, 457 U.S. at 225.

177. Immigration and Nationality Act, 8 U.S.C. § 12 (2004).

178. State law that conflicts with federal law is "without effect." U.S. CONST. art. VI; *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824); *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). The Supreme Court has explained that federal law may preempt state law expressly or impliedly. *Gade v. Nat'l Solid Wastes Mgmt Ass'n*, 505 U.S. 88, 98 (1992). Express preemption of state and local law occurs when "Congress has unmistakably . . . ordained that its enactments alone are to regulate . . . [and, thus] state laws regulating that subject must fall." *Id.* at 116 (citing *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963)). Preemption may also occur when the scope of federal regulation makes it clear that Congress intended to preempt state or local action in a specific field or where state or local action directly conflicts with the federal regulatory scheme. *Id.* at 98.

179. Memorandum from Jody Feder & Michael Garcia, Legislative Attorneys American Law Division, to Hon. Paul E. Kanjorski, A Legal Analysis of Proposed City of Hazleton Illegal Immigration Relief Act Ordinance, 4 (June 29, 2006), *available at* Congressional Research Service, <http://pridef.org/Civil/Hazleton/hazleton%20legal%20documents/Hazleton%20Memo.pdf>. (citing *DeCanas v. Bica*, 424 U.S. 351, 354 (1976) (emphasis in original)) [hereinafter Feder & Garcia]

180. *DeCanas*, 424 U.S. at 354. In *De Canas v. Bica*, the California Superior Court found that a California statute which prohibited an employer from knowingly employing an alien who was not lawfully present in the United States was unconstitutional because it was pre-empted under the Supremacy Clause. *Id.* at 353. However, upon granting certiorari, the Supreme Court found that California had "sought to strengthen its economy by adopting federal standards in imposing criminal sanctions against state employers who knowingly employ aliens who have no federal right to employment within the country." *Id.* at 936 (emphasis added). The Supreme Court further noted that "even if such local regulation has some purely speculative and indirect

INA indicates that the INA “does not preempt states and localities from independently regulating the *employment* of illegal aliens through licensing and similar laws.”<sup>181</sup> Thus, it is unlikely that a court would find that federal immigration law preempts Valley Park from denying licenses to businesses, located within Valley Park, that employ “illegal aliens.”<sup>182</sup>

Assuming *arguendo* that sub-federal regulation of certain conduct involving immigration is not conclusively preempted by the INA, some provisions of local “illegal immigration” ordinances “appear to raise significant federalism concerns, as they involve conduct that comes under the purview of federal immigration law.”<sup>183</sup> Passing through the door that *DeCanas* left ajar and into the realm of local immigration matters, municipalities like Valley Park may argue that local “anti-immigrant” ordinances are consistent with federal measures that urge local enforcement.<sup>184</sup> In light of proposed legislation considered by Congress such as the CLEAR Act and the Attorney General’s mandate,<sup>185</sup> local governments that promulgate “illegal immigration” ordinances may argue that their measures are consistent with a federal mandate. However, inconsistent with *Plyler* and with the exception for employment measures set forth in the INA, Valley Park’s and other municipal immigration ordinances would impose measures that are inconsistent with the federal regulations set forth in the INA, and thus, encroach impermissibly upon federal regulations designed to deter illegal immigration. Furthermore, the CLEAR Act and the Attorney General’s “inherent authority” theory, promote local enforcement of federal law, not the promulgation of local legislation regulating immigration.<sup>186</sup>

In all circumstances, the manner and scope of Valley Park’s ordinance raises concerns related to constitutional structure of government regulation of immigration. One factor the Court may consider in determining whether Valley Park’s “illegal immigration” ordinance impermissibly encroaches on federal power is to determine whether it “focuses directly upon . . . essentially local problems and is tailored to combat effectively the perceived evils.”<sup>187</sup> Section Two of the Valley Park ordinance imposes civil penalties on an entity or individual who “aids and abets” illegal aliens *anywhere* in the United States, rather than simply in the City of Valley Park. Because of its express

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impact on immigration, it does not thereby become a constitutionally proscribed regulation of immigration ....” *Id.* Notably, issues of equal protection were not raised, nor discussed on appeal.

181. *Feder & Garcia*, *supra* note 179, at 4.

182. *Id.* at 6.

183. *See id.* at 3.

184. *See DeCanas v. Bica*, 424 U.S. 351 (1976).

185. *See supra* Part I.A.

186. *See generally* Tiffany Walters Kleinart, *Local Enforcement of Immigration Law: An Equal Protection Analysis*, 55 DEPAUL L. REV. 1103 (2006).

187. *DeCanas*, 424 U.S. at 357.

extraterritorial scope, the ordinance is not narrowly tailored to combat local problems facing the residents of Valley Park, and attempts to address U.S. immigration violations nationwide.<sup>188</sup> Thus, Valley Park's "illegal immigration" ordinance would be preempted by federal immigration law.

In sum, the proposed ordinance would arguably create a new immigration regulatory regime independent from the federal system. In the absence of a direct congressional consent, state and local governments encroach on federal plenary power to regulate immigration when they implement such far-reaching immigration legislation. Moreover, it is questionable that even with Congress's express consent, states and local legislatures could implement a comprehensive scheme relating to immigration.<sup>189</sup> As it reasoned in *Graham* and in the series of cases that established that classifications based on "documented" alienage, the Court should again employ a strict scrutiny standard and strike down state and local legislation, like Valley Park's "illegal immigration" ordinance, that discriminates based on "undocumented alienage" and encroaches on the plenary federal power to regulate immigration and naturalization.

#### CONCLUSION

If and when residents of Valley Park and other municipalities challenge the constitutionality of local "illegal immigration" ordinances, the Court should exercise strict judicial scrutiny. Undocumented immigrants, like "documented" immigrants, should be regarded as an inherently suspect class because they are excluded from the political processes and because they have historically been the target of racist and nativist policies. The Court should stand up for undocumented aliens, in injury and injustice, and where they seek relief from discriminatory, sub-federal legislation. Moreover, the Court should strictly scrutinize state and local "illegal immigration" ordinances because they deny undocumented immigrants and other discrete and insular minorities access to basic services and violate their right to education, free speech and equal access to police protection. Finally, when subjected to strict scrutiny, Valley Park, and other local governments, are unlikely to provide a compelling state interest to justify their discriminatory legislative classification, and thus, the Court should find that Valley Park's "illegal immigration" ordinance violates undocumented immigrants' Fourteenth Amendment right to equal protection of the law.

While America is a nation of laws, it is also a nation of immigrants. Population growth, economic distress, nativist and racial overtones tend to

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188. See Feder & Garcia, *supra* note 179, at 6.

189. See Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection and Federalism*, 76 N.Y.U. L. REV. 493 (2001); cf. Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627 (1997).



complicate today's immigration dilemma. The fundamental question has become what inequalities are tolerable under these circumstances? Author Garry Willis writes, "[r]unning men out of town on a rail is at least as much American tradition as declaring unalienable rights."<sup>190</sup> For centuries, people have left their nations of origin fleeing racism and oppression, injustice, and have come to the United States—by sea, by land, by air—in search of freedom. We cannot turn our back on our immigrant history. While our constitutional structure welcomes state experimentation, that experimentation has often times been the source of discriminatory policy. If we allow local legislation to address the immigration dilemma facing our nation, we may be endorsing the creation of state and local laboratories of bigotry.<sup>191</sup> We must avoid our tradition of running the "others" out of town, and instead, rely on the American tradition of tolerance and the full protection of unalienable rights to guide our policy.

SARAH E. MULLEN-DOMÍNGUEZ<sup>192</sup>

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190. GARRY WILLIS, *INVENTING AMERICA* xiii (1978).

191. See Michael J. Wishnie, *supra* note 189, at 553.

192. I would like to thank my family, especially my husband Cristóbal, for the unwavering love and support they have provided. A special thank you to my faculty advisor and inspirational professor Joel K. Goldstein and to the people of San Cristóbal de Las Casas for changing the way I understand the world.